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U.S. Citizenship  
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Services

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FILE: Office: TEXAS SERVICE CENTER Date: **AUG 27 2008**  
SRC 07 245 52332

IN RE: Petitioner:   
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.



Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on certification. The director's decision will be affirmed in part.

The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director also stated that the record reflected that the beneficiary was the petitioner's brother, and that this fact had not been disclosed to the Department of Labor prior to the approval of the ETA 750. The director stated that the beneficiary's relationship to the petitioner called into question the true availability of the proffered position to other qualified applicants. Citing to 20 C.F.R. § 656.30(d), the director invalidated the labor certification application and denied the petition accordingly.

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 19, 2008 decision, the two issues in this case are whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the beneficiary's familial relationship with the petitioner is sufficient to invalidate the ETA 750 labor certification application. The AAO will first review the director's decision with regard to the petitioner's ability to pay the proffered wage, and then examine the director's proposed invalidation of the instant ETA Form 750.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12 per hour (\$24,960 per year). The Form ETA 750 states that the position requires two years of work experience in the proffered position.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all relevant evidence in the record. Relevant evidence in the record includes the petitioner's Forms 1120S for tax years 2001, 2002, 2003, 2004, and 2005. In response to the director's Request for Further Evidence (RFE) dated May 8, 2008, the petitioner submitted its Form 1120S for tax year 2007. The record also contains the Form 1120 for tax year 2007 for Los Compadres Mexican Restaurant #3, with Employer Identification Number of [REDACTED] also located in Tallahassee, Florida.<sup>1</sup> The record also contains Balance Sheets for December 31, 2002, 2004 and 2007, and Profit and Loss statements for the petitioner for tax years 2002, 2004, and 2007.

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in May 1997, to have gross annual income of \$567,125, a net annual income of \$38,739, and to currently employ nine workers. On the Form ETA 750, signed by the beneficiary on April 22, 2001, the beneficiary claimed that he had worked for the petitioner since April 1998.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the

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<sup>1</sup> Since this tax return is for a distinct business established in 2006, the net income or net current assets reflected in this return are not material to these proceedings.

circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has provided no further evidentiary documentation, such as W-2 Forms or Forms 1099-MISC that he employed and paid the beneficiary a salary equal to or greater than the proffered wage of \$24,960. Thus, the petitioner cannot establish its ability to pay the proffered wage based on the beneficiary's wages, and must establish its ability to pay the entire proffered wage from the 2001 priority year through tax year 2007.<sup>2</sup> The petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

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<sup>2</sup> The record closed as of the petitioner's response to the director's RFE dated May 31, 2008. The record also contains the petitioner's Form 1120S for tax year 2007. Therefore the AAO will examine the petitioner's tax returns for tax years 2001 to 2007.

(Emphasis in original.) *Chi-Feng Chang*, 719 F. Supp. at 537.

In the director's RFE, he stated that the petitioner's net income was found on line 21 of the 1120S tax form. Where an S corporation's income is exclusively from a trade or business, CIS does consider net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions in tax years 2003, 2004, 2005, and 2007, shown on its Schedule K for these tax years, the petitioner's net income is found on Schedule K of its tax returns for the same four years. As noted by the director in his RFE, the petitioner did not submit its tax return for tax year 2006. Therefore, the petitioner cannot establish its ability to pay the proffered wage from tax year 2001 to 2007. Nevertheless, the tax returns submitted to the record demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,960 per year from the priority date:

- In 2001, the Form 1120S, line 21, stated a net income of \$21,741.
- In 2002, the Form 1120S, line 21, stated a net income of -\$160.
- In 2003, the Form 1120S, Schedule K, line 23, stated a net income of \$10,877.
- In 2004, the Form 1120S, Schedule K, line 17e, stated a net income of -\$7,695.
- In 2005, the Form 1120S, Schedule K, line 17e, stated a net income of \$40,080.
- In 2007, the Form 1120S, Schedule K, Line 18, stated a net income of \$41,817.

Therefore, for the years 2005 and 2007, the petitioner did have sufficient net income to pay the proffered wage. However, the petitioner did not establish its ability to pay the proffered wage based on its net income in tax years 2001 to 2004, and in tax year 2006.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The tax returns submitted to the record for tax years 2001 to 2004 reflect the following:

- The petitioner's net current assets during 2001 were \$4,618.
- The petitioner's net current assets during 2002 were \$3,124.
- The petitioner's net current assets during 2003 were \$12,499.
- The petitioner's net current assets during 2004 were \$792.

The petitioner's net current assets during tax years 2001 to 2004 were not sufficient to pay the proffered wage of \$24,960. As previously stated, the petitioner did not submit its tax return for tax year 2006, and thus, the AAO cannot determine whether the petitioner had sufficient net current assets to pay the proffered wage in tax year 2006.

In its response to the director's RFE, the petitioner submitted unaudited Balance Sheets and Profit and Loss statements for tax years 2002, 2004, and 2007. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. **Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.**

Therefore, from the date the Form ETA 750 was filed with Citizenship and Immigration Services, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for tax year 2005 and 2007. Thus the petitioner cannot establish that it has the ability to pay the proffered wage. The petition will be denied.

The AAO will now examine the second issue raised by the director in his decision, namely, the proposed invalidation of the petitioner's ETA Form 750, based on the familial relationship between the beneficiary and the petitioner.

The director cites to *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986); however, this decision does not appear dispositive in the present matter. The beneficiary's relationship to the

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<sup>3</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

instant petitioner does not appear analogous to the beneficiary's circumstances in *Silver Dragon Chinese Restaurant*. In this precedent decision, the beneficiary was the owner of 50 percent of the petitioner's issued shares, signer of the petitioner's tax returns, and at the time of filing the labor certification, the sole officer of the petitioning corporation. Thus, it was determined that the employer had misrepresented the nature of the position, a chef to be supervised by the president.

The AAO notes that under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). In the instant matter, the beneficiary is the brother of the petitioner's sole shareholder/owner.

As the director noted in his decision, the petitioner apparently provided no information as to the familial relationship between the petitioner's owner and the beneficiary at the time of filing the Form ETA 750, and initial I-140 petition, although the petitioner in its response to the director's RFE established the relationship. In a Board of Alien Labor Certification Appeals (BALCA) decision, *Matter of Crown USA, Inc.* 90-INA-113 (BALCA) states the following: "An employer must provide information concerning its relationship to the alien if the certifying officer requests such information." Unlike *Silver Dragon* in which the petitioner misrepresented the proffered job's position in the petitioner's hierarchy, there is no such misrepresentation in the instant petition. Without a finding of misrepresentation or fraud, the AAO cannot invalidate the petitioner's Form ETA 750. The AAO withdraws the director's decision with regard to the proposed invalidation of the Form ETA 750.

As previously stated, the evidence submitted to the record does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The AAO concurs with the director's decision with regard to the petitioner's ability to pay the proffered wage. The fact that the beneficiary is related to the petitioner's owner also cast doubts on the realistic nature of the proffered position; however, the AAO does not find sufficient grounds to invalidate the labor certification based on the stated familial relationship. As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden with regard to its ability to pay the beneficiary the proffered wage. .

**ORDER:** The petition is denied.